

The Administrative Law Judge found claimant was earning a post-injury average weekly wage equal to 90 percent or more of her pre-injury average weekly wage. Accordingly, the Administrative Law Judge found claimant was not entitled to a work

disability and limited claimant to permanent partial general disability benefits based on her stipulated permanent functional impairment of 11 percent.¹

On appeal, claimant contends the Administrative Law Judge erred in the determination of claimant's post-injury average weekly wage. The Administrative Law Judge found claimant's post-injury average weekly wage was \$772 per week. In contrast, the claimant argues her post-injury average weekly wage is somewhere between \$176.55 and \$457.07 entitling claimant to a work disability between 45 to 60 percent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Claimant and her husband, William C. Harner, both were injured on February 28, 1995, while employed by the respondent as over-the-road truck drivers. They were injured when the truck that was driven by claimant's husband slid out of control on an icy bridge in Seward County, Kansas. Claimant and her husband are residents of the state of Ohio.

A separate award was entered by the Administrative Law Judge in a companion case for claimant's husband, William C. Harner, designated as Docket No. 219,813. That docket number was also appealed and the Appeals Board has reviewed that award in a separate Order.

The Appeals Board finds that the Administrative Law Judge's Decision should be affirmed. Additionally, the Appeals Board finds the Administrative Law Judge's findings and conclusions contained in her Decision are accurate and need not be repeated in this Order. Those findings and conclusion are, therefore, adopted by the Appeals Board as its own.

The Administrative Law Judge found that claimant's pre-injury average weekly wage was \$687.45 based on the wage statement submitted by the respondent. Neither party appealed this finding. The Appeals Board, therefore, adopts \$687.45 as claimant's pre-injury average weekly wage.

The central issue in this case is the determination of the amount of claimant's post-injury average weekly wage. Claimant contends her post-injury average weekly wage is less than 90 percent of her pre-injury average weekly wage. Accordingly, the claimant argues she is entitled to a work disability.

¹See K.S.A. 44-510e(a).

After claimant and her husband were released with permanent restrictions to return to work, they contacted the respondent who did not return them to work because of the permanent restrictions. She argues that the joint 1997 U.S. Individual Income Tax Return filed by her and her husband, and admitted into evidence at the regular hearing, represents her post-injury average weekly wage.

Claimant argues she is currently working as a truck driver for an owner/operator as an independent contractor as evidenced by the fact that the owner/operator does not pay unemployment taxes. Further, claimant contends the owner/operator does not provide workers compensation insurance coverage. As an independent contractor, claimant asserts her post-injury wage should be determined based on either of three alternative methods, all of which, compute to a post-injury average weekly wage of less than 90 percent of her pre-injury average weekly wage. First, claimant contends her post-injury average weekly wage is \$176.55. This is determined by taking her and her husband's 1997 adjusted gross income of \$18,361.00 and dividing that amount by 52 weeks or \$353.10. Then the \$353.10 weekly amount is divided by two to arrive at a post-injury average weekly wage for claimant in the amount of \$176.55. Second, the \$13,000 depreciation figure for a pick up truck is added to claimant's adjusted gross income of \$18,361.00 for a total of \$31,361.00 divided by 52 weeks and then by two arriving at a \$301.55 post-injury average weekly wage. Third, the gross receipts from the Schedule C of the tax return in the amount of \$45,599 is added to the \$1,946 claimant and her husband received in wages for a total of \$47,545 divided by 52 or \$914.33. This amount is divided by two for a post-injury average weekly wage of \$457.07². Ninety percent of claimant's pre-injury average weekly wage is \$618.71. Therefore, claimant asserts that all three possible methods to determine claimant's post-injury average weekly wage, when working as an independent contractor, amounts to less than 90 percent of her pre-injury average weekly wage entitling her to a work disability.

Conversely, respondent argues the record establishes that claimant's post-injury average weekly wage is \$772. This weekly amount is more than claimant's \$687.45 pre-injury average weekly wage. Accordingly, respondent asserts claimant is limited to permanent partial disability benefits based on the stipulated 11 percent functional impairment rating.

Respondent employed vocational expert, Karen Crist Terrill, to interview the claimant and her husband in order to complete a list of job tasks performed in jobs they had been employed in the 15 years immediately preceding their February 28, 1995, accident. Ms. Terrill also expressed an opinion on claimant's post-injury earning ability. Ms. Terrill interviewed the claimant and her husband by telephone because she is

²Claimant's brief contains the \$457.07 amount, but the correct amount should be \$457.17.

located in Kansas and claimant and her husband are residents of the state of Ohio. This interview took place on September 21, 1998, and the tapes of the telephone interview were admitted into evidence at Ms. Terrill's deposition. At the time of the interview, Ms. Terrill asked claimant the amount she and her husband were presently earning working as over-the-road truck drivers. The claimant replied, "Well, it's fifteen forty-four." Ms. Terrill clarified claimant's answer by repeating one thousand five hundred and forty-four dollars a week. Claimant verified the amount and indicated the amount should be divided in half to arrive at each individual's earnings before taxes. Additionally, claimant told Ms. Terrill the owner/operator provided the truck for claimant and her husband. When claimant's husband was interviewed by Ms. Terrill he verified that currently he and his wife were earning \$1,544 a week before taxes.

Claimant timely objected to Ms. Terrill testifying to what claimant had told her during the telephone interview that she and her husband were currently earning as over-the-road truck drivers. The ground for the objection was that Ms. Terrill's testimony was hearsay evidence. Claimant also objected to the admission of the tapes into evidence on the basis "I don't know how we're going to reproduce them. . . ." It is important to point out, claimant had the opportunity to testify again by deposition and to be examined on what she told Ms. Terrill in regard to the amount of compensation she and her husband were currently earning. But claimant failed to do so. Furthermore, in workers compensation cases, hearsay evidence is admissible subject to questions of competency, credibility, and the weight to be given to the evidence. The common-law rules of evidence are not to be strictly applied in workers compensation cases.³ In regard to the admissibility of the tapes, the original of the tapes were admitted into the record and not a reproduction of the tapes.

Claimant testified at the regular hearing held on July 8, 1998, that she and her husband were currently working for owner/operator Ron Hanna, who paid them by check made out to S & W Enterprises which is a partnership consisting of claimant and her husband. They had been working for Ron Hanna for over a year at the time of the regular hearing and were earning 34 cents per mile between the two of them.

As previously noted, claimant argues their 1997 income tax return proves that she and her husband are currently employed as independent contract truck drivers. Where before the February 28, 1995, accident, they were employed by the respondent in an employer/employee relationship. As independent contractors, claimant contends her average weekly wage is determined after certain business expenses are subtracted from gross receipts. In contrast, when claimant worked for the respondent, she was an employee, and respondent paid claimant's business expenses. The weekly amount paid

³Love v. Kerwin, 187 Kan. 760, 763, 359 P.2d 881 (1961).

claimant while employed by the respondent was designated as wages and not a contract payment requiring business expenses to be paid out of the payments.

But the Appeals Board concludes the record as a whole does not prove that the \$1,544 per week payment claimant informed Ms. Terrill she and her husband were receiving from owner/operator Ron Hanna was a contract payment subject to reduction for business expenses and not a weekly wage. Claimant and her husband both indicated in their interview with Ms. Terrill that the weekly \$1,544 payment was before taxes but did not mention the payment would be reduced by business expenses. Additionally, claimant argues that since her present employer does not pay unemployment taxes and does not have workers compensation insurance coverage, this is indicative that claimant is an independent contractor and not an employee. The Appeals Board finds that this is an argument set forth by the claimant in her brief but is not substantiated in the record.

Additionally, the Appeals Board concludes the joint 1997 income tax return filed by claimant and her husband does not establish that claimant's post-injury average weekly wage was less than 90 percent of her pre-injury average weekly wage. The tax return does not indicate the number of weeks claimant and her husband worked to earn the gross receipts indicated on the Schedule C. Also, the Appeals Board questions whether the expenses indicated on the Schedule C and deducted from the gross receipts are all related to her and her husband's trucking business. For example, there is a \$13,000 depreciation expense for a pick up truck. But during Ms. Terrill's interview with claimant, claimant indicated that the owner/operator furnished her and her husband the truck. Therefore, the Appeals Board questions how a \$13,000 depreciation expense for a pick up truck relates to their trucking business.

Claimant has the burden to prove by the preponderance of the credible evidence her right to an award of compensation.⁴ The Appeals Board concludes claimant failed to prove that her post-injury actual weekly earnings did not exceed 90 percent of her pre-injury average weekly wage.⁵ Accordingly, claimant has failed to prove her entitlement to a work disability. As found by the Administrative Law Judge, claimant is entitled to permanent partial disability benefits based on an 11 percent functional impairment rating.

AWARD

⁴See K.S.A. 44-501(a) and K.S.A. 44-508(g).

⁵See K.S.A. 44-510e(a).

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Pamela J. Fuller's November 12, 1998, Decision should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steve Brooks, Liberal, KS
Shirla R. McQueen, Liberal, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director